IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CIVIL REVISION APPLICATION No 629 of 1988

For Approval and Signature:

Hon'ble MR.JUSTICE P.B.MAJMUDAR

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1. Whether Reporters of Local Papers may be allowed to see the judgement? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

PATEL SHANKARBHAI LALLUBHAI

Versus

HEIRS OF DECED. SOMABHAI MATHURBHAI PATEL

Appearance:

MR RN SHAH for Petitioner

Mr.Nilesh Pandya, for Mr.P.G. Desai, for the respondents.

CORAM : MR.JUSTICE P.B.MAJMUDAR

Date of decision: 07/07/2000

ORAL JUDGEMENT

1. The petitioner is the original defendant, against whom suit for eviction was filed by one Somabhai Mathurbhai, being Regular Civil Suit No.163 of 1982, in the Court of Civil Judge (J.D.), at Balasinor. During the pendency of the proceedings, original landlord has expired and, therefore, his heirs were also brought on

record and they continued the said proceedings. The aforesaid suit was filed on the ground that the plaintiff has given on rent the suit premies, i.e. an open piece of land, situated near Survey No.1037, to the defendant No.1 at the rate of Rs.10/- per month. In addition to the above-said rent, the tenant was to pay water tax, N.A. tax, etc. It is the say of the plaintiff in the suit that the defendant is in arrears of rent from 1.9.1982 and accordingly, he was in arrears of rent for more than six months on the date of filing of the suit. It is also the case of the plaintiff that defendant No.1 has sub-let the suit premises to defendants 2 to 4. The decree for eviction, therefore, was sought for on the aforesaid grounds of arrears of rent and sub-letting.

2. The defendants appeared in the suit and denied both the grounds.

3. The trial court thereafter framed necessary issues and came to the conclusion that the defendant-tenant was not in arrears of rent. It was also found that the plaintiff has failed to prove that the defendant No.1 has sub-let the suit premises to defendants 2 to 4. The trial court accordingly dismissed the aforesaid suit for possession.

4. The heirs of the original plaintiff preferred an appeal, being Regular Civil Appeal No.157 of 1984, challenging the decree of the trial court, by which the suit for possession was dismissed. The learned appellate Judge, vide judgment and order dated 30th April, 1988, allowed the said appeal and decreed the suit for possession and accordingly, decree for possession was passed on the ground of sub-letting. The appellate court was of the opinion that defendant No.1 had parted with the possession in favour of defendants 2 to 4 for the purpose of organizing musical programme and that, that would amount to parting with the possession and on that ground, decree for possession was passed by the appellate court by allowing the appeal.

5. On behalf of the original defendant the present revision application has been filed challenging the order of the appellate court. Since the decree for possession has been passed on the ground of sub-letting only, the question which is required to be considered in this revision application is whether the evidence on record would constitute the ground of "sub-letting", as envisaged under Section 13(1)(e) of the Bombay Rent Act.

6. Mr.R.N. Shah, learned Advocate for the

petitioner, submitted that original defendant No.1-tenant wanted to organize some entertainment programme for about five days, starting from 25th October, 1982 and for that purpose, defendant No.1 had entered into an oral agreement with defendant No.3 for the purpose of conducting programme in the suit premises for five days. For the purpose of the said programme, a `Pandal' was placed, which can, of course, be erected easily, and in order to see that there is some cover over the head at the time of the entertainment programme, the aforesaid pandal was placed on the site by original defendant No.3. The plaintiff, having realized that his premises is used for entertainment programme by original defendant No.1, instituted the aforesaid suit on 29th October, 1982 and on the date of filing of the suit, the Court had also passed an order of preparing panchnama at Exhibit 24. As per the said Panchnama, it was found that one big tent, having material of cloth, was found to be in existence, having length of 10 ft., and there was also partition by red cloth in the aforesaid tent. There was also a wooden partition in the nature of window for ticket collection and, there was also a wooden stage erected there. The aforesaid panchnama was made on 29th October, 1982, i.e. the day on which the suit was filed. According to the plaintiff, therefore, the defendant NO.1 has parted with the possession of the suit property in favour of defendants 2 to 4 for the purpose of entertainment programme and in that view of the matter, according to the plaintiff, defendant No.1 has committed an act of sub-letting and, therefore, he was required to be evicted under the provisions of Section 13(1)(e) of the Rent Act.

7. Defendant No.1 has stated in his evidence that he has not parted with the possession in any manner. He has not handed over possession to defendant Nos. 2 to 4 and that he is in physical possession of the aforesaid suit property. In his evidence, he has stated that on 15th October, 1982, one South Indian, viz., Bhojwani, came to defendant No.1 and the defendant No.1 agreed to have Disco dance contract with him and defendant No.1 agreed to pay Rs.200/- per day for the aforesaid programme. It was the responsibility of the aforesaid organizers of the programme to have tent of cloth material as well as for providing lighting facility. He has specifically stated in his evidence that he has not taken any rent for the aforesaid purpose. The aforesaid entertainment programme was to be conducted for five days and after five days, since defendant No.1 could not get any profit out of the said programme, the aforesaid entertainment programme was closed. He has specifically stated that he has not taken any rent in any manner and that he has not given the

premises to defendants 2 to 4 for any Pan-Beedi shop. In substance, it is the say of defendant No.1 that he wanted to have entertainment programme for five days and, therefore, he had entered into agreement with defendant No.3, who had organized the said programme by taking fixed amount from defendant No.1. From the evidence of defendant No.1, therefore, it cannot be said that the property in question was transferred or alienated by defendant No.1 to either defendants 2, 3 or 4. However, for the purpose of entertainment programme, which defendant No.1 organized, with the help of the aforesaid other defendants, defendant No.1 had agreed to pay fixed amount to them. The question which requires consideration, therefore, is : whether the aforesaid conduct of defendant No.1 can constitute "sub-letting", as contemplated by Section 13(1)(e) of the Bombay Rent Act. It is pertinent to note that there are separate provisions in the Rent Act for the change of the purpose of letting. However, the decree is not passed by the appellate court on the ground that defendant No.1 has changed the suit premises to any other purpose than the one for which letting was made or that defendant No.1 could not have started business, even temporarily, in the suit premises. The specific case of the plaintiff is only sub-letting and, therefore, this Court is required to consider whether there is legal evidence available on record for passing the decree on the ground of sub-letting.

8. The learned trial Judge, after recording the evidence of the parties and after hearing the arguments of both the sides, came to the conclusion that there is no evidence to the effect that the defendant No.1 was charging any amount as premium from defendants 2 to 4 or that it cannot be said that the property in question was subjected to sub-letting by defendant No.1 in favour of defendants 2 to 4. It was specifically found by the trial court that part of the open land, which defendant No.1 is occupying as a tenant, was given for five days to the dancing party. Defendant No.3 was the organizer of the programme and for that, temporary construction of cloth and wooden material was made. It is interesting to note that the aforesaid entertainment programme was organized by defendant No.1 on 25th October, 1982 and within four days, i.e. on 29th October, 1982, the plaintiff filed the aforesaid suit on the ground of sub-letting and panchnama was made on the very day. It is no doubt true that as per the Panchnama, there was a wooden partition, and there was a tent on the aforesaid place for the purpose of entertainment programme, but simply by the aforesaid erection of the temporary

construction of tent etc., it cannot be said that there was sub-letting by defendant No.1 in favour of either defendant No.2, 3 or 4. Looking to the aforesaid evidence on record and especially also having found that there is no evidence that defendant No.1 was charging any rent from defendants 2 to 4 by way of consideration the trial court found that there is no sub-letting as possession cannot be said to have been transferred by defendant No.1 to rest of the defendants. The trial court, accordingly, dismissed the suit.

9. The decree of the trial court was challenged by the original plaintiff before the District Court. The appellate court, however, came to the conclusion that since defendant No.1 himself has admitted that he had inducted a South Indian to conduct programme in the suit land, it will amount to temporary assignment of interest by defendant No.1 in favour of defendant No.3 in the suit land and even though, in some of the part, son of defendant No.1 is running a pan beedi shop, still, defendant No.1 has allowed defendants 2 to 4, who are strangers, to do their business in the suit land, and so the provisions of Section 13(1)(e) are attracted and accordingly, decree for possession was passed by the learned appellate Judge.

10. I have gone through the evidence on record and I have heard the arguments of both the learned Advocates. The question which requires consideration is whether the aforesaid act of defendant No.1 in organizing dancing programme in the suit premises and for that purpose, allowing defendants 2 to 4 to use the suit property for performing the programme would constitute sub-letting. It is not in dispute that the aforesaid dancing programme had continued in the suit premises for five days and, thereafter, it was closed. It is the say of defendant No.1 in his evidence that he was giving fixed amount to defendant No.3 for performing the said programme every day upto 5 days and whatever might be the collection of the programme for 5 days, defendant No.1 was taking the same. There is nothing in the evidence to show and even it is not the case of the plaintiff that the defendant No.1 himself was getting any amount from defendants 2 to 4 for giving premises for the said programme. As stated earlier, the plaintiff has not filed the suit on the ground of change of user and only ground which has been canvassed is about sub-letting and, therefore, even if defendant No.1 has engaged himself in business for a few days in the suit premises by giving the part of the land for organizing the programme, it cannot constitute sub-letting as required by Section 13(1)(e) of the Rent

Act. The learned appellate Judge has considered the admission on the part of defendant No.1 to the effect that the possession of the premises was handed over to defendant No.3. However, learned appellate Judge has not considered the fact that what defendant No.1 has stated in the evidence is that for the purpose of the aforesaid programme, defendant No.3, who was to perform the programme, was handed over the possession. It is not an admission on the part of defendant No.1 that he has handed over the possession of the suit premises by way of transferring his interest in the suit land. The appellate Judge has, therefore, completely misread the evidence of defendant No.1 in reaching the conclusion that there was an admission on the part of defendant No.1 about the sub-letting. The evidence on record only proves that there was erection of `Mandap' or `Pandal', with one wooden window for collection of tickets and that entertainment programme / dancing programme was organized in the suit premises, but that does not mean that defendant No.1 has parted with his legal possession, with an intention to create sub-tenancy in favour of defendants 2 to 4. In fact, there is absolutely no evidence to show that even defendant No.1 was collecting any amount as a premium from defendant No.3 for allowing him to use the suit property. On the contrary, the evidence is that defendant No.1 was giving Rs.200/- to defendant No.3 for the purpose of performing the programme. There is nothing on record to show that there was any restriction in the Rent Note that the tenant cannot organize any entertainment programme in the house or in the rented premises. As a matter of fact, the landlord, having inducted the tenant in the rented premises, cannot restrict the reasonable use of the property by the tenant and defendant No.1 could not have been prevented to make use of the same or even organize some party in the rented premises or entertainment programme unless by such programme, there is any damage to the rented premises for which there is a separate ground available in the Act for getting decree for eviction. Similarly, if the premises is given for one purpose and if it is used for another purpose, there is separate ground in the Rent Act to file a suit for eviction on the said ground, but, in the instant case, the only ground, which was pressed into service, was the ground of sub-letting and the evidence on record can never be said to be constituting any ground for passing a decree on the ground of sub-letting. As stated earlier, the appellate Judge has committed an error in considering the aforesaid evidence of the tenant as an admission on his part. There is absolutely no admission about sub-letting at all. The appellate court has failed to

consider that the premises in question was temporarily given and that too, only for five days for entertainment programme. The appellate court, therefore, has completely misread the evidence in coming to the conclusion that defendant No.1 has allowed the premises to be used for business, and for business purpose, it is transferred to defendants 2 to 4, who are strangers. If the things are to be considered from that angle that even if the rented premises is used for few days for some religious function and for that purpose, some Pandal or Mandap is erected, then also, it can be said that the tenant has transferred his interest in favour of a third party, who is to perform such religious ceremony or some musical programme, etc. In the instant case, except the fact that Mandap or Pandal is erected, with some partition in between, there is no further evidence to show that defendant No.1 has parted with the possession with an intention to transfer his possession to defendants 2 to 4. There is absolutely nothing to show that he had even charged any amount towards consideration for giving possession. As a matter of fact, at the most, it can be said that defendant No.1 had done some business for five days for getting some income by conducting entertainment programme, for which he gave contract to defendant No.3. However, looking to the evidence on record, it can never be said that defendant 2 or 3 have ever acquired the status of a sub-tenant, which may create sub-lease by head tenant in favour of the sub-tenant. The learned appellate Judge, therefore, has completely misread the evidence and hence, merely relied upon the so-called admission of the tenant and panchnama in question. The learned Judge has observed in the judgment in paragraph 17 that the temporary assignment of interest in favour of the organizers of the entertainment programme in the suit land is there. However, it is pertinent to note that it can ne....

assignment of interest, even temporarily, by defendant No.1 in favour of defendants 2 and 3. As a matter of fact, defendant No.1 has, all throughout, retained the possession with him, but temporarily, allowed the organizers of the programme to conduct the show and as possession is given only for that purpose, it cannot be said that defendant No.1 had parted with possession in their favour. Mr.Shah for the petitioner argued that, at the most, it can be said that defendant No.1 allowed defendant No.3 to remain on the suit land for few days by way of licence for performing a programme only and that too, on behalf of defendant No.1.

11. At this stage, reference to Section 13(1)(e) of

the Bombay Rent Act is required to be made, which reads as under :-

> "13. When Landlord may recover possession.-(1)Notwithstanding anything contained in this Act but subject to the provisions of section 15, a landlord shall be entitled to recover possession of any premises if the Court is satisfied -
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> ... ...
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> (e) that the tenant has, since the coming into operation of this Act unlawfully sub-let the whole or part of the premises or assigned or transferred in any other manner his interest therein; or ....
>
> ... ... "

Looking to the evidence on record, it can never be said that the tenant has unlawfully sub-let whole or part of the premises or said to have assigned or transferred in any other manner his interest in the premises. The tenant has never parted with the lawful possession. It cannot be said that he has transferred his interest by permitting defendant No.3 to perform the show, and defendant No.1 has never lost his possession in favour of the aforesaid persons. In any case, as stated earlier, defendant No.1 can never be said to have lost his possession or cannot be said to have assigned his interest or possession in favour of the aforesaid persons and merely if entertainment programme is organized in the rented premises and if the person, who is performing the programme, is allowed to occupy the premises for some time, it can never attract the provisions of Section 13(1)(e) of the Act.

12. This Court, while examining the question of taking partner in the business, has stated in Manchharam Sobhraj and others v. Jamnadas Mulchand and another, XVI GLR 898 that unless there is evidence to show that the tenant has transferred legal possession to his partners, with whom he has been constituting a partnership, he cannot be said to have unlawfully sub-let or assigned or transferred his interest in the premises within the meaning of Section 13(1)(e) of the Act.

13. In the case of M/s. Chhotalal Maganlal Badraniwala & Ors. v. M/s. Mayur Silk Mills & Ors., XX GLR 372, a Division Bench of t....

paragraph 14 as under :-

> "... Sub-letting means that the premises which are in the possession of a person as a lessee are sub-let wholly or partly to a third person. Unless there are two distinct persons or personalities that can be described as a head-tenant and a sub-tenant, there cannot be sub-letting. Sub-letting or sub-tenancy and must mean transfer of exclusive possession from a head-tenant to a sub-tenant either of the whole premises in the occupation of the tenant or the part thereof .... "

In the instant case, it can never be said that there is either transfer, exclusive or part, of the premises by the head tenant to the sub-tenant. There is no tenancy created at all by defendant No.1 in favour of either defendant No.2 or 3, as the case may be. In that view of the matter, in my view, the trial court was right in coming to the conclusion that the premises in question, which was subjected to entertainment programme for 5 days by the defendant No.1 and for that purpose, if defendant Nos. 2 and 3 are allowed to occupy the premises temporarily, it would never constitute unlawful sub-letting, and, therefore, Section 13(1)(e) of the Act cannot be said to have been attracted. The appellate court, as stated earlier, has completely misread the evidence and simply on the ground that defendant No.3 was allowed to do business, and relying upon the Panchnama that erection of `Mandap' or `Pandal' is found to be there, passed decree for possession on the ground of sub-letting. Even at the cost of repetition, I may state that it may attract other provisions of the Rent Act, like change of user or changing the purpose of letting, but in any case, the aforesaid evidence on record can never constitute sub-letting. There is no requisite evidence for passing a decree under Section 13(1)(e) of the Act, which can be said to be present in the instant case. In that view of the matter, the appellate court has committed an error of law in coming to the conclusion that there is sub-letting by defendant No.1 in favour of defendants 2 and 3.

14. Mr.Pandya, however, relied upon the judgment of

the Honourable Supreme Court in Phiroze Bamanji Desai v. Chandrakant M. Patel and others, AIR 1974 SC 1059, wherein the Honourable Supreme Court has said that when there are findings of fact, the High Court, exercising revisional power under Section 29(2) of the Act, should not interfere with the said finding. Mr.Pandya, therefore, submitted that whether there is any sub-letting or not is a question of fact and, therefore, this Court should not interfere in revision in Section 29(2) of the Act. Section 29(2) provides as under :-

> "29. Appeal.-
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> ... ...
>
> (2) No further appeal shall lie against any decision in appeal under sub-section (1) but the High Court may for the purpose of satisfying itself that any such decision in appeal was according to law, call for the case in which such decision was taken and pass such order with respect thereto as it thinks fit.
>
> ... ... "

It is no doubt true that, normally, the High Court, while exercising revisional powers under Section 29(2), would not interfere with the finding of fact, unless it was found that there was no legal evidence or provisions of Section (13)(1)(e) are not attracted in the case. However, as stated earlier, the appellate Judge has completely misread the evidence on record in coming to the conclusion that there is sub-letting. As stated earlier, the evidence on record does not constitute any ground, by which provisions of Section 13(1)(e) are attracted. In that view of the matter, if the evidence on record do not constitute a ground of eviction under Section 13(1)(e) of the Act, and even if decree under the said provision is passed, there will be clear error of law and this Court, while exercising revisional jurisdiction, can consider a question of law, if it is wrongly decided by the appellate court. As stated earlier, the evidence on record do not constitute the ground for eviction on the ground of sub-letting. In that view of the matter, the decree passed by the appellate court is required to be set aside and that of the trial court is required to be restored.

15. Mr.Pandya states that even if it is assumed that holding entertainment programme may not constitute sub-letting, then also, there is erection of Pan-Beedi shop by defendants 2 and 3 and in view of that, decree as prayed for should have been granted. In this connection, the learned appellate Judge has clearly stated that even if it is presumed that son of defendant No.1 was running a Pan-Beedi shop, there was no ground for allowing defendants 2 and 3 to do business. The appellate court has not given any finding that defendants 2 and 3 were doing any Pan-Beedi business in the said premises and it is the case of defendant No.1 that the Pan-Beedi business is run by his son from the beginning. In any case, the entry of defendants 2 and 3 in the premises was only because of the said entertainment programme in question and not otherwise. In view of the fact that no finding is recorded by the appellate court that defendants 2 and 3 are running the Pan-Beedi shop, it is not possible for this Court to confirm the decree for eviction on the aforesaid ground.

16. In view of the aforesaid, this Revision Application is requir and order of the appellate court passed in Regular Civil Appeal No.157 of 1984 is accordingly set aside and the decree of the trial court passed in Regular Civil Suit No.163 of 1982 is restored. The effect of the same will be that the suit of the plaintiff shall stand dismissed. Rule is accordingly made absolute, with no order as to costs.

7th July, 2000 (P.B. Majmudar, J.)

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(apj)